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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 351.

ANHEUSER-BUSCH, Incorporated,
Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

And Companion Cases.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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QUESTIONS PRESENTED.

The Brief for the Respondent in Opposition, states as the first question presented the following (Br. in Op. p. 4): "Whether Anheuser-Busch, Inc., and its predecessor were entitled, under Section 234 (a) (7) of the Revenue Acts of 1924 and 1926 to deductions in 1924 and 1925 *in excess of those allowed by the Commissioner* on account of obsolescence of the cases and bottles." (Italics ours.)

In so far as such statement implies that the Commissioner at any time made an allowance for "obsolescence"

of the Bevo cases and bottles *here in controversy* it is erroneous.

Respondent adverts (Br. in Op. pp. 11, 16-17) to allowances made by the Commissioner for cases and bottles sold or damaged beyond repair, but such cases and bottles were not included in the write-offs here in controversy. The equipment here involved was identified by its storage in specified locations, and consisted exclusively of cases and bottles which were in sound and usable condition (R. 581). Respondent also adverts to allowances in respect of 12-ounce and 7-ounce cases and bottles, which can have no possible relevancy here inasmuch as all of the equipment here involved was 10-ounce equipment.

The only "allowances" of any kind conceivably attributable to the equipment here involved were the so-called "depreciation" allowances computed and allowed in prior years upon a per trip basis. Since such allowances in respect of bottles had been based upon breakage, abrasion and loss (R. 582), they were not attributable to the bottles here involved which survived the hazards of manufacture and shipment and which, by being stored, were removed from such hazards. Allowances for depreciation of the cases were given consideration in the write-off of 1924. If, as estimated, the stored cases had made an average of two trips each, the depreciation considered in the write-off corresponds exactly with the depreciation "allowed" in prior years. The District Court so found (R. 582).

It follows that upon the record presented there was no recovery, through allowances made by the Commissioner, of any portion of the cost of the particular equipment in controversy excepting to the extent of $74,987.70 depreciation on cases considered in the write-off of 1924. The loss remains unreflected in income unless the deductions here involved be allowed.

ARGUMENT.

I.

Point I of respondent's argument (Br. in Op. pp. 13-17), dealing with petitioners' claim for allowances on account of obsolescence under Section 234 (a) (7), attempts to disparage the importance of reasons II, III and IV relied upon by petitioners for the allowance of the writ (Pet. pp. 22-23, c. f. Sup. Br. pp. 33-37) by insisting either that the Circuit Court of Appeals did not make the holdings alleged to conflict with the decisions of this court, or that it did not base its decision upon such holdings.

By so doing the respondent in effect acknowledges that the important elements in this case are not legalistic but factual, and brings into focus the primary point made by the petitioners that the Circuit Court of Appeals disregarded essential undisputed facts of the case and the findings of the District Court based thereon.

Note, if the court please, the degree in which the express holdings of the Circuit Court of Appeals are subordinated in respondent's brief in opposition. Although the Circuit Court of Appeals stated (R. 1157) that "the reasons for denying deduction are similar" to those in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13,—and the primary reason given by this Court in the latter case for the disallowance was that the loss there was not functional and did not result from external causes,—respondent now asserts (Br. in Op. pp. 12-13, n. 8) that the Circuit Court of Appeals did not hold that the changed regulation (permitting the introduction of dealcoholized beer) and resulting competition was not such a cause as would permit of a deduction for obsolescence under Section 234 (a) (7). Although the Circuit Court

of Appeals (R. 1150, 1160) deemed it necessary in reaching its conclusion to reject the finding of the District Court that the assets had been abandoned, respondent now asserts (Br. in Op. p. 13) that the point of abandonment was not the major point on which the decision turned. Although the Circuit Court of Appeals declared (R. 1148) that Section 234 (a) (7) "contemplates that the annual depreciation deductions shall take into consideration both the physical life of the property and its useful life",—and, inferentially, contemplates no allowances for accrued and unanticipated obsolescence (cf. R. 1152)—respondent asserts (Br. in Op. pp. 14-15) that "the court below, however, did not rest its decision on the ground that obsolescence must be spread over more than one year."

If the respondent is in error in his subordination of the importance, in the Circuit Court of Appeals' decision, of the points adverted to, then Reasons II, III and IV for the allowance of the writ fully justify assumption of jurisdiction by this court.

On the other hand, if the respondent is correct in his interpretation of the decision of the Circuit Court of Appeals, then this is a fact case and the Circuit Court of Appeals so far disregarded the facts as found by the District Court that supervisory jurisdiction is clearly called for.

That this is a fact case is virtually conceded by the respondent in his statement (Br. in Op. p. 15) that the Circuit Court of Appeals in substance held "that the taxpayer had not established that the obsolescence of the cases and bottles in controversy was sustained in the years 1924 and 1925, respectively."

Upon such issue, was it not of importance to consider whether, when Bevo was superseded, there were other ex-

pected uses for the equipment which rendered it impossible then to determine that it had lost, or was losing, its usefulness? Was it not of importance to examine into the effect, upon the status of the equipment, of the development (at substantial outlays of capital) of the new products, Ginger Ale, Grape Bouquet and Carcho, which were to be marketed in Bevo bottles? Was it not of importance to consider the schedule of sales of products moving in Bevo bottles which was adopted as part of the findings of the District Court (R. 620)? Was it not of importance to reach a conclusion upon the question when, considering the history of the industry, reasonable men would conclude that the new products were failures and that usefulness of the equipment had for all purposes terminated?

The opinion of the Circuit Court of Appeals reflects no adequate consideration of these questions and deals with the case as if the facts upon which we chiefly relied were not in it. It rules that there was no accrual of obsolescence in the tax years.

It should be remembered that at the very time that Bevo sales were undergoing their decline, and long before the accumulation, through returns from the trade, of the surplus supplies of Bevo cases and bottles had been completed, plans (thereafter promptly put into effect) were being laid for the introduction of new products, in the production of which it was expected that the Bevo equipment would be used. As early as 1920 authority for sales of equipment was withdrawn in view of the probable need of the equipment for bottling Ginger Ale (R. 422). It was not until the end of 1921 that the cases and bottles ceased to accumulate in large numbers, and not until the end of 1923 that the maximum accumulation of bottles occurred (R. 614-615). Thus at the very time of its accumulation the status of the equipment became bound up with the destiny of the new products.

We have urged that equipment rendered unusable in prior years for the marketing of the superseded product, Bevo, (but reserved in good faith, and with reasonable expectations of use, for the marketing of other products), became unusable, i. e., obsolete, *for all purposes* when those other products failed. The theory of allocation of the losses to the years 1924 and 1925 was that a reasonable length of time should, in view of the expected use, be accorded for ascertainment whether there would in fact be a loss, and that those years spelled the passing of such reasonable period of time.

Respondent, in urging that the record does not support the premises upon which our theory of retarded obsolescence rests, avers (Br. in Op. p. 17) that "until 1932 attempts to find uses for the cases and bottles continued." Respondent should know from the findings of the District Court elicited by his own requests, that the only new products offered for sale in Bevo cases and bottles after 1924 were several medicinal products not expected to sell in great volume (R. 617). The introduction of these medicinal products did not constitute an "attempt" to find use for the surplus supplies of equipment previously written off.

The issue gets down to this: When was it reasonable to conclude that the introduction in 1921 and 1922 of the new beverages would not result in the use of the surplus supply of cases and bottles? Despite the development of those new products, total shipments in Bevo equipment continued in 1924, after three years experience with the new products, to decline (R. 620). The decision of the management in 1924 and 1925 that the stored equipment would not be used was a fair and reasonable conclusion from the facts and figures, and, in the light of subsequent events, was proved correct by the undisputed fact that the stored equipment was never used again (R. 582).

II.

Under Point II of respondent's argument (Br. in Op. pp. 18-20) dealing with petitioners' claim for allowances for loss of useful value under Section 234 (a) (4), respondent enumerates the requirements of Article 143 of Regulations 65, which he asserts have not been met. Only by an effective lock-out of a portion of the record facts, can respondent reach such conclusion under the remaining facts.

> "1. The deduction is applicable to cases in which the loss of useful value is brought about through a change in business conditions."

Respondent concedes (Br. in Op. p. 19) that a change in business conditions brought about the permanent decline of Bevo sales which resulted in the accumulation of surplus stocks of equipment, but avers that this change did not take place in 1924 or 1925. We note no requirement of the regulation that a "change in business conditions" take place *in the year* of the asserted loss. It would indeed offend economic law and common sense to assume that the effect (loss of useful value) necessarily takes place coincident with the operative cause.

Let us suppose that Anheuser-Busch, Incorporated, had attained large scale production in, for example, Grape Bouquet, and, through such production, had put the stored equipment into use. There would then have been no loss of useful value. Clearly the loss cannot be attributed to the year of the "change in business conditions" when at that time there was no determined loss. It must be attributed to a later year when the loss was capable of establishment.

> "2. The deduction is limited to cases in which the usefulness of capital assets is suddenly terminated."

In urging that there was no abrupt termination of the usefulness of the property in either 1924 or 1925, respondent relies upon the fact that actual use had terminated earlier, thus treating "usability" and "use" as synonymous. Such treatment completely overlooks the fact that, in years prior to the tax years, the equipment was in good faith reserved for use, and overlooks the contention that uselessness could not be ascribed to it until it was demonstrated by experience that it could not be used. The equipment ceased to be useful when the products for which it was reserved failed. Whether such failure was demonstrable in 1924 or 1925 is an issue to which respondent refrains from addressing himself, and an issue which was completely overlooked by the Circuit Court of Appeals.

> "3. The taxpayer must discontinue the business or discard the property permanently from use."
>
> "4. The loss must be claimed for the year in which the taxpayer discontinues the business or discards the property."

The assertion by respondent that the assets were not discarded until many years later (Br. in Op. p. 19) implies rejection of the District Court's finding (R. 582) that they were discarded in the tax years. In respect of this finding, we refer to the discussion at pp. 39-41 of our supporting brief. Unless discarding implies sale or destruction,—a view wholly untenable in view of the cases cited at p. 37 of our supporting brief,—Anheuser-Busch, Incorporated, did all that could be reasonably required to evidence its permanent discarding of the property by having removed it from its production facilities (R. 582) and by not in fact ever using the property after it was written off (R. 582).

> "5. Any loss resulting from gradual processes for which depreciation deductions are authorized may not be allowed as loss of useful value."

It is conceded, we assume, that the loss here in controversy was not capable of anticipation and inclusion in depreciation deductions.

Unless the deductions here in controversy be allowed, the fact of the loss which occurred will remain unrecognized. That a loss occurred cannot be doubted. Whether it occurred in the tax years is the real issue. Primarily because the Circuit Court of Appeals failed to give effect to the essential facts upon which the District Court's conclusions were based, this Court is asked to exercise its supervisory power.

Respectfully submitted,

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